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No. 92-___

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MINAS H. PAPAS, *et al.*,
Petitioners,

v.

ZOECON CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling or packaging of pesticides.

2. Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims *not* based on inadequate labeling or packaging of pesticides.

3. Whether Congress intended FIFRA to preempt state common law tort claims even when the Environmental Protection Agency (EPA) registered a product and approved its label on the basis of inaccurate information submitted by the manufacturer.

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[1] Petitioners, Minas H. Papas and Ollie M. Papas, his wife, appeared as Plaintiffs/Appellants below. Respondents, The Upjohn Company and Zoecon Corporation, appeared as Defendants/Appellees below.

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OPINIONS BELOW

The opinion of the Court of Appeals following remand from this Court is reported at 985 F.2d 516 (11th Cir. 1993) and is reproduced in the petitioners' appendix (Pet.App.) at 1a. It is hereinafter referred to as *Papas II*. The judgment is reproduced at Pet.App. 11a. The first opinion of the Court of Appeals is reported at 926 F.2d 1019 (11th Cir. 1991) and is reproduced at Pet.App. 35a. It is hereinafter referred to as *Papas I*. The opinion of the District Court, filed on August 3, 1989, is unreported and is reproduced at Pet.App. 13a.

JURISDICTION

The judgment of the Court of Appeals following remand from this Court was entered on March 8, 1993. *See* Pet.App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

§ 136v. Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

§ 136(p) Label and labeling. --

(1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

This is a diversity action, filed pursuant to 28 U.S.C. § 1332, seeking damages under Florida common law for severe personal injuries suffered by petitioner Minas H. Papas and derivative injuries suffered by his wife. From 1982 through 1986, Mr. Papas administered treatments for dermatological disorders found in dogs housed in the Clay County Humane Society's Animal Shelter. The treatments required physically dipping dogs in a bath containing one of two products, Paramite, a product manufactured by Respondent Zoecon, or Mitaban, a similar product manufactured by the Upjohn Company.[2] Throughout the course of his employment, Mr. Papas was repeatedly and continuously drenched by these products, and inhaled their fumes. In July of 1986, Mr. Papas began displaying symptoms of serious health disorders, was ultimately hospitalized and, in late 1986, was diagnosed as having aplastic anemia/pancytopenia, a debilitating hematological disorder, and declared totally disabled. His condition and symptoms were consistent with a classic case of benzene poisoning.

Zoecon's Paramite product contained, as approximately 70% of its make-up, an aromatic petroleum based hydrocarbon solvent as an inert

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[2] Pursuant to a stipulation between the parties, Petitioners' claims against the Upjohn Company were dismissed with prejudice by the District Court on August 7, 1992, and the District Court entered judgment on August 11, 1992. Accordingly, the only claims remaining for disposition in this appeal are Petitioners' claims against Zoecon Corporation.

ingredient. The solvent utilized in Paramite (known as "Sure-Sol 190") typically consisted of 1/10 of 1% (0.10%) benzene by weight. Benzene is a highly toxic substance which has been placed on the EPA's list of inerts of toxicological concern, which are subject to data requirements.

Paramite's label did not inform purchasers or end users, such as Mr. Papas, that the product contained benzene, nor was there any warning of the potential for the development of diseases such as aplastic anemia/pancytopenia, which can result from long-term exposure to benzene. In addition, even though Zoecon registered Paramite with the EPA, according to the evidence of record, Zoecon never informed the EPA that Paramite contained benzene or that, because of the presence of the benzene, the product posed a health risk to humans.

Under EPA regulations promulgated pursuant to FIFRA, manufacturers seeking to register pesticides have wide latitude to decide the language of pesticide labels. Manufacturers draft their own labels which they submit to the EPA for acceptance. 40 C.F.R. § 152.50(e). Manufacturers may apply at any time to have the EPA accept changes in previously accepted labels. *See* 40 C.F.R. § 152.44. In many cases, a manufacturer need only notify the EPA that it is making the revision. 40 C.F.R. § 152.46(a). Other revisions require no notification at all. 40 C.F.R. § 152.46; § 152.130(b) & (c); and § 152.132(d)(5). In this case, however, none of those regulatory procedures provided any protection to Mr. Papas and his wife, in part, because Zoecon did not inform the

EPA of the presence or quantities of benzene contained in its products.[3]

In February, 1988, the Papases filed suit against Zoecon alleging separate counts for negligence, strict liability, and breach of implied warranty under Florida common law. Each count included allegations that Zoecon, among other things, failed to warn that Paramite contained chemical solvents (benzene) which caused aplastic anemia/pancytopenia and to inform users to take appropriate precautionary measures. The complaint also alleged that Zoecon failed to take numerous other reasonable steps and improperly designed, manufactured, and marketed Paramite.[4]

On April 10, 1989, Zoecon moved for partial summary judgment on the ground that FIFRA preempts all of the Papases' claims to the extent that

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[3] The base formulation of Zoecon's Paramite product had previously been registered as a pesticide under FIFRA prior to the amendment of the statute and creation of the EPA in 1972. When FIFRA was amended in 1972, it allowed for products previously registered, such as the base formulation of Paramite, to be registered by the EPA with relatively little regulatory review of the product and its labels. *See, e.g.* Office of the Inspector General, *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613* (Sept. 30, 1992) at ii ("Due to certain provisions of FIFRA, pesticides were registered without requiring a complete set of toxicity studies."). That is what happened with Paramite.

[4] The Papases' complaint did not allege that Zoecon had failed to notify the EPA that Paramite contained benzene when it submitted Paramite's label for approval because, among other things, the Papases were not aware of that fact at the time they filed suit. Nevertheless, the Papases believe and seek to prove that, if Zoecon had informed the EPA of the presence of benzene in Paramite and had adequately warned about the benzene on Paramite's label, the Papases would not have been injured.

they are predicated upon Zoecon's failure to warn. Even though Zoecon never informed the EPA of the presence of benzene in its product, Zoecon contended that the EPA's registration of the product under FIFRA shields Zoecon from common law liability.

The District Court entered partial summary judgment in Zoecon's favor, and found that FIFRA expressly preempts the claims to the extent they are predicated upon inadequate warnings and labeling. Pet.App. 25a-26a. The Papases took an interlocutory appeal from the District Court's ruling pursuant to a 28 U.S.C. § 1292(b) certification. On February 28, 1991, the Court of Appeals for the Eleventh Circuit held that FIFRA impliedly preempts the Papases' claims to the extent that they are based upon inadequate warnings and labeling. Pet.App. 37a. In this initial ruling, the Court of Appeals reviewed FIFRA's statutory language and regulations promulgated by the EPA under FIFRA and declined to find that petitioners' common law claims are expressly preempted. Pet.App. 46a. "[M]indful that Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," the court stated, "we admit to a little uncertainty and pass over the question of express preemption." Pet.App. 45a.

On June 24, 1992, this Court vacated the Court of Appeals' opinion and remanded the case for further consideration in light of this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). Pet.App. 54a. On August 4, 1992, the Court of Appeals ordered the parties to submit supplemental

briefs commenting on the significance of *Cipollone*. Pet.App. 56a.

The Papases argued in their supplemental brief that *Cipollone* re-affirmed that express preemption provisions, such as the one found in FIFRA, must be construed narrowly and in light of a strong presumption against preemption. The Papases then demonstrated that FIFRA's express preemption provision, § 136v(b), narrowly read in light of the presumption against preemption, simply does not apply to any common law claims. In addition, the Papases argued that, even if § 136v(b) can be read to apply to some common law claims, it does not preempt any claims in this case because of Zoecon's failure to provide the EPA with critical information about the risks of its product. The Papases also argued that FIFRA cannot preempt those warning claims based on allegations that are unrelated to "labeling and packaging," the only areas specifically mentioned in FIFRA's preemption provision. Finally, the Papases argued that, in light of this Court's reasoning with respect to express warranties in *Cipollone*, the Papases' implied warranty claim is not preempted.

Reconsidering the case on remand from this Court in light of *Cipollone*, the Court of Appeals held, on March 8, 1993, that FIFRA expressly preempts all claims based on failure to warn theories. Pet.App. 10a. The Eleventh Circuit specifically rejected the petitioners' contention that Zoecon could be held liable because of its misrepresentations to the EPA. Pet.App. 7a. The Eleventh Circuit also ruled that the

petitioners' claims for failure to warn in literature or postings beyond the label (such as point-of-sale signs or consumer notices) are expressly preempted by FIFRA. Pet.App. 8a. Finally, the Court of Appeals rejected the Papases' contention that their implied warranty claim must survive. Pet.App. 10a.

REASONS FOR GRANTING THE WRIT

For 14 years after FIFRA was amended in 1972, no reported decision suggested that FIFRA's preemption provision prevented pesticide poisoning victims from pursuing any state common law claims. Indeed, in the only reported decision during that period on the subject, the D.C. Circuit held that FIFRA does *not* preempt common law claims. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1539 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). During those years, untold numbers of pesticide poisoning victims, who are afforded no compensation under FIFRA, successfully sought and obtained compensation from pesticide manufacturers. These damage actions also spurred the manufacturers to improve their labels.

In 1986, the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1043, (1987), *after remand*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in part*, 112 S.Ct. 2608 (1992), finding all inadequate labeling claims brought by cigarette smokers after 1965 impliedly preempted. Despite the myriad differences between cigarette legislation and FIFRA (including the fact that the former dictates the language of cigarette labels, while

the latter leaves labeling decisions to pesticide manufacturers), the pesticide manufacturers started urging the courts to apply the Third Circuit's logic to FIFRA.

Relying on the Third Circuit's decision in *Cipollone* or on its progeny, and despite the lack of congressional action finding fault with *Ferebee*, a number of trial courts throughout the nation began adopting the pesticide manufacturers' arguments. In 1991, the Eleventh Circuit, in *Papas I*, became the first appellate court to find common law claims impliedly preempted by FIFRA. Prior to this Court's decision last term in *Cipollone*, several other appellate and trial courts followed suit. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.)(*Arkansas-Platte I*), *vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chemical Co.*, 113 S.Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir. 1993)(*Arkansas-Platte II*), *petition for cert. filed* (May 10, 1993). Shortly after deciding *Cipollone*, and recognizing that its analysis in that case would shape the resolution of FIFRA preemption, this Court vacated the Eleventh Circuit's decision in *Papas I*, *supra*, and the Tenth Circuit's decision in *Arkansas-Platte I*, *supra*, and remanded them for reconsideration.

While many hoped that *Cipollone* would resolve the issue of FIFRA preemption, the confusion and conflict among the lower courts remains. This muddled and unjust state of the law should no longer be countenanced. This Court should grant *certiorari* on this issue.

I. There Is A Deep Difference Of Opinion Among The Lower Courts Concerning FIFRA Preemption.

There are several different splits among the lower courts concerning FIFRA preemption. The breadth of the preemption decision of the Eleventh Circuit is unprecedented and presents all of the key FIFRA preemption issues on which the lower courts have split.

A. The Lower Federal And State Courts Are Split On Whether FIFRA Preempts Common Law Inadequate Labeling Claims.

Courts before and after *Cipollone* have been divided over whether FIFRA preempts state common law claims of inadequate labeling. Without guidance from this Court, the currently confused state of the law will continue.

1. Before *Cipollone*.

Before this Court issued its opinion in *Cipollone*, five appellate courts ruled on whether FIFRA preempts state common law tort actions. The only two that squarely considered the issue both found that FIFRA does not expressly preempt *any* common law claims. *Ferebee, supra*, 736 F.2d at 1529; *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992).[5] These two courts also found no implied preemption.

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[5] Notably, the Eleventh Circuit, in the initial appeal of this case, admitted to "a little uncertainty" on the express preemption issue. Pet.App. 45a.

The other three appellate courts disagreed, however, following the now-rejected reasoning of the Third Circuit's decision in Cipollone, or its progeny, and finding implied preemption.[6]

Lower court opinions showed a similar conflict. After the Third Circuit's decision in *Cipollone*, federal district courts variously held state common law inadequate warning claims expressly preempted,[7] impliedly preempted,[8] and not preempted at all.[9] The

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[6] *Papas I, supra*; *Arkansas Platte II, supra*; and *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir.), *on remand*, No. HAR 90-1424, 1992 WL 368062 (D. Md. Nov. 30, 1992), *appeal filed*, No. 93-1003 (4th Cir. Dec. 29, 1992)(using classic implied preemption terminology, the Fourth Circuit held failure to warn claims preempted because they "conflict" with FIFRA).

[7] *See, e.g., Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

[8] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[9] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339 (D. Mont. 1991), *aff'd on other grounds*, No. 91-36024 (9th Cir. May 10, 1993); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704

(continued...)

numerous opinions from lower state courts on this preemption issue likewise showed a widespread conflict.[10] Simply put, the courts were bedeviled by the FIFRA preemption question before this Court's decision in *Cipollone*. They continue to be baffled today.

2. After *Cipollone*.

At least seventeen state and federal courts have addressed the issue of whether FIFRA preempts state common law claims of inadequate labeling since this Court's decision in *Cipollone*. Using varying analyses, some courts ruled that claims of inadequate labeling are not preempted,[11] others found varying degrees of

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[9](...continued)
F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D.N.Y. May 18, 1986).

[10] Cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach Cty. June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach Cty. Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent Cty. May 5, 1989). Cases finding preemption include *Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991); *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist. Ct. Saguache Cty. June 7, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton Cty. May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery Cty. May 17, 1991).

[11] *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258 (E.D. Tex. 1993); *Couture v. Dow Chemical U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992).

express preemption,[12] and still others found implied preemption.[13] Included among these opinions are six post-*Cipollone* appellate court decisions: *Shaw v. Dow Brands, supra* (7th Cir.); *Arkansas-Platte, supra* (10th Cir.); *Davidson, supra* (Nevada Supreme Court); *Yowell, supra*, (Missouri Court of Appeals); *Brennan, supra* (Florida Court of Appeals); and the instant case.[14]

The existence of seventeen court opinions on this question in less than a year, which employ a variety of

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[12] *Shaw v. Dow Brands*, No. 92-2323 (7th Cir. May 18, 1993); *Papas II, supra*; *Arkansas-Platte II, supra*; *Brennan v. Dow Chemical Co.*, 613 So.2d 131 (Fla. Ct. App. 1993)(preemption of failure to warn but not warranty claims); *Levesque v. Miles Inc.*, 816 F.Supp. 61 (D.N.H. 1993); *Burke v. Dow Chemical Co.*, 797 F. Supp. 1128 (E.D.N.Y. 1992)(only as to affixed labels); *Casper v. E.I. Dupont De Nemours*, 806 F. Supp. 903 (E.D. Wash. 1992); *King v. E.I. Dupont De Nemours*, 806 F.Supp. 1030 (D. Me. 1992), *appeal filed*, No. 92-2381 (1st Cir. Nov. 20, 1992); and *Gibson v. Dow Chemical Co.*, CV 92-30 (E.D. Ky. Oct. 19, 1992).

[13] *Davidson v. Velsicol Chemical Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 123 L.Ed.2d 650 (1993); *Yowell v. Chevron Chemical Co.*, 836 S.W. 2d 62 (Mo. Ct. App. July 13, 1992); *Jordan v. Southern Wood Piedmont Company*, 805 F. Supp. 1575 (S.D. Ga. 1992); *Burge v. Jones*, CV B-92-022 (S.D. Tex. Nov. 18, 1992); *Worm, supra* (on remand to district court, implied preemption of all failure to warn claims); and *Bander v. Southern States Cooperative, Inc.*, No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992).

[14] In addition, the issue is currently pending before three federal courts of appeals: *King, supra* (express preemption of inadequate labeling claims); *Worm, supra*, (implied preemption of some inadequate labeling claims); *Bailey Farms, Inc. v. Nor-Am Chemical Co.*, No. 90-CV-83 (W.D. Mich. October 1, 1991), *appeal filed*, Nos. 92-2402; 92-2403 (6th Cir. Oct. 15, 1992)(no preemption of failure to warn claims not involving the label or labeling).

analyses and reach different conclusions, shows the dire state of the law in this area. The confusion has already gone on too long. Only this Court can eliminate it.

B. The Courts of Appeals Are Split On Whether Warnings That Do Not Accompany The Product Are Preempted.

The far-reaching preemption decision below created a split in the Circuits on whether FIFRA preempts state requirements with respect to warnings that do not accompany the product. According to *Papas II*:

> [A]ny claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs.

Pet.App. 8a. Both the Ninth and Second Circuits disagree with the Eleventh Circuit's conclusion concerning the reach of FIFRA's preemption provision.

In *Chemical Specialties Manufacturers Ass'n., Inc. v. Allenby*, 958 F.2d 941 (9th Cir.), *cert. denied*, 113

S.Ct. 80 (1992), the Ninth Circuit concluded that FIFRA does not preempt California's Proposition 65, an Act that requires, among other things, point-of-sale warnings to the consuming public about products that pose a health risk. The court stated:

> FIFRA's definition of labeling cannot encompass every type of written material accompanying the pesticide at any time. If this were true, then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling.

Id. at 946.

Likewise, the Second Circuit in *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2nd Cir. 1989), was asked whether FIFRA preempts New York's Pesticide Notification Program, a set of notification requirements intended to alert and educate the public about the imminent use of pesticides. The court concluded that the provisions do not constitute preempted "labeling" under FIFRA. *Id.* at 120. In so doing, the Court stated that, "Notification requirements such as cover sheets, signs, and newspaper advertisements do not impair the integrity of the FIFRA label.... To hold otherwise would preempt a wide range of state activities which Congress did not subject to the jurisdiction of the EPA." *Id.* at 119-20. *See also Worm, supra*, 970 F.2d at 1307-08 n.2 (FIFRA's labeling provision "would not appear to include general advertising statements not

made in connection with a particular sale" citing *Jorling, supra*) and *Burke, supra*, 797 F. Supp. at 1140 ("If ... warnings to the trade, warnings apart from labels or packaging, limitation on sales to professionals, or other protections falling generally within the ambit of warnings should have been used when the content of the label was fixed by EPA there remains a liability question for the trier of fact.").

Only this Court can resolve the split among the circuits on this point.

C. The Courts Of Appeals Are Split On Whether FIFRA Preempts State Claims Based On The Failure To Provide Federal Regulators With Complete Information.

There is also a split in the circuits on whether FIFRA preempts state common law claims related to the manufacturer's failure to provide the EPA with complete and accurate information. According to *Papas II*, "[I]t is for the EPA Administrator, not a jury, to determine whether labeling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made." Pet.App. 7a. The court went on to conclude that, "We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures." Pet.App. 7a.

The Fourth Circuit in *Worm*, on the other hand, distinguished between a state common law tort that would "impose a labeling requirement inconsistent with those established by FIFRA" and one that would

not. 970 F.2d at 1308. The court stated, "[I]f the state imposes a duty to improve a product or to maintain a label in accordance with the federal standards, no conflict exists and FIFRA does not preempt." *Id.* at 1309. *Accord Burke, supra*, 797 F. Supp. at 1142. *See also Hurley v. Lederlee Laboratories Division of American Cyanamid*, 863 F.2d 1173 (5th Cir. 1988)(if the jury finds a deficiency in the information the manufacturer provided to the federal regulatory agency, the agency's approval of the warning does not preempt an inadequate labeling claim).

Only this Court can resolve this split.

D. The Lower Courts Are Split On Whether FIFRA Preempts Breach Of Warranty Claims.

The Court of Appeals found that FIFRA preempts the Papases' breach of implied warranty claims. Pet.App. 10a. This conclusion conflicts with the post-*Cipollone* holding of the Florida Court of Appeal that "FIFRA does not preempt the breach of warranty claim, since it was a common law claim arising out of a voluntary contractual commitment." *Brennan, supra*, 613 So.2d at 132. Review by this Court is essential to prevent the gross injustice of two different victims located in the same state being treated differently because of where they filed their case.

E. The Unresolved Splits Among The Lower Courts Are Causing Injustice And A Waste Of Resources.

There are several adverse results stemming from the lack of clarity on FIFRA preemption. First, the varied opinions among courts about FIFRA preemption mean that the ability to recover compensation for personal injuries or property damage caused by a pesticide depends on the fortuitous factor of where suit is filed. This is certainly the situation for the Papases. Inadequate labeling claims similar to those raised by the Papases were allowed to proceed in the District of Columbia, Arkansas, Montana, and Texas. Non-"label" warnings like those requested by the Papases were required by states and allowed by the Second and Ninth Circuits. A claim based on the manufacturer's failure to comply with federal standards, similar to the Papases' desire to show that Zoecon failed to provide the EPA with complete and accurate information, was permitted to go forward in the Fourth Circuit. Finally, breach of warranty claims filed in Florida, the state in which the Papases reside and in which the alleged tort occurred, were permitted to go forward. Because the Papases happened to file their case in a federal court in the Eleventh Circuit, however, none of these claims survived.

Second, while there is no dispute that FIFRA preemption must be analyzed in light of this Court's ruling in *Cipollone*, there is a significant dispute about how to apply *Cipollone.* As the review of the decisions above indicates, there are almost as many interpretations of how to apply *Cipollone* as there are

interpreters. This Court will eventually have to resolve the confusion concerning FIFRA preemption. The need for uniform justice compels an immediate resolution of this question.

Third, litigants and courts throughout the country are spending enormous time and resources on disputes over FIFRA's preemptive effect. There is no reason for them to continue spinning their wheels. The instant case presents the issue clearly and without procedural defect. It is also a perfect vehicle for ending the second-guessing about the result this Court would reach because it alleges all the key state common law tort claims. The Court should end the confusion about FIFRA preemption by reviewing this case.

II. The Eleventh Circuit's Reasoning Conflicts With *Cipollone* And, As A Result, Decides An Important Federal Question Incorrectly.

The Eleventh Circuit misapplied *Cipollone* and, therefore, decided an important federal question incorrectly. FIFRA simply does not preempt petitioners' claims.

A. The Eleventh Circuit Failed To Interpret FIFRA's Language Narrowly And Discern Congressional Intent.

Cipollone establishes that: 1) a court's task during preemption analysis is to ascertain Congressional intent; 2) in conducting this analysis, the court is to presume that the historic police powers of the states,

including the states' tort remedies, are not superseded; and 3) the presumption against preemption is rebutted only if preemption is the clear and manifest intent of Congress. *Cipollone, supra,* 112 S.Ct. at 2617. The application of these principles requires a careful statutory analysis which the Eleventh Circuit did not consistently employ. Had the Eleventh Circuit applied these principles properly, it would have found that FIFRA does not preempt any of the Papases' state common law claims.

The statutory analysis called for by *Cipollone* requires a court to read §§ 136v(a) and (b) in conjunction with each other as two parts of a single section. When this is done, it is clear that the reference in subsection (b) to "Such State" points back to a "State" in subsection (a) that is "*regulating*."[15] After reviewing the legislative history of the 1965 Cigarette Act, this Court declared in *Cipollone* that the ordinary meaning of the word "regulate" refers to a state's positive enactments, not a state's common law. 112 S.Ct. at 2619. The plain text and legislative history of FIFRA lead to the same conclusion. FIFRA, therefore, does not preempt state common law tort actions.

Further, a court applying to FIFRA the careful statutory analysis called for in *Cipollone* must focus on what requirements "in addition to or different from" means in § 136v(b). FIFRA's provisions repeatedly point to the desire to protect health and the environment. *See, e.g.,* 7 U.S.C. § 136a(c)(5)(a

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[15] Likewise, § 136v(c) refers to a state that is regulating.

pesticide registrant's label must contain adequate warnings to protect against unreasonable adverse effects on health and the environment). The principle guiding state common law tort theories is the same: protect health and the environment. As such, state common law tort actions do not establish "requirements in addition to or different from" those of FIFRA.

Similarly, FIFRA's provisions concerning misbranding show that the statutory scheme and the state common law scheme neither oppose nor contradict each other; rather, they parallel and complement each other. Under FIFRA, the EPA's acceptance of a pesticide's label does not necessarily mean that all of FIFRA's labeling standards are satisfied. According to the statute, a pesticide is misbranded, *even if the label is approved*, if the label does not contain a warning that is adequate to protect health and the environment. 7 U.S.C. § 136(q)(1)(F)-(G).[16] Further, the EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. at 37,960-61 (Sept. 26, 1984).[17]

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[16] *See* 7 U.S.C. § 136a(f)(2) (the fact that the product was registered with the EPA is no defense to a misbranding charge); § 136d(a)(2) (ongoing obligation to provide the EPA with relevant information).

[17] Indeed, this Court, in *Cipollone*, recognized that, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 112 S.Ct. at 2618. In addition, this Court found that allowing common law claims to go forward does not conflict with a legislative

(continued...)

This Court's ruling in *Cipollone* also requires a review of legislative history to discern legislative intent. The legislative history of the 1972 version of FIFRA does not support the assertion that Congress intended to preempt common law claims when it enacted § 136v(b). *See, e.g.*, S. Rep. No. 838, 92d Cong., 2d Sess. (1972). Moreover, Congress ratified the D.C. Circuit's 1984 finding in *Ferebee, supra*, that § 136v(b) does not preempt common law claims when it extensively revised the statute in 1988.[18] Unlike the 1969 Cigarette Act addressed in *Cipollone*, Congress never altered the language of § 136v(b) to expand FIFRA's preemptive effect.

Further, the wide latitude the EPA gives to pesticide manufacturers to decide the language of

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[17](...continued)
goal of protecting the national economy from nonuniform labeling. *Id.* at 2619. Here, the existence of state common law tort systems enhances EPA's regulatory efforts by providing pesticide manufacturers with an incentive to improve their labels and products. *See, e.g., Thornton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992). This is particularly important because, despite the laudatory goals of federal pesticide regulation, the EPA has not been able to fully review the safety of a large number of pesticides that are currently on the market. *See, e.g.*, U.S. GAO, *Lawn Care Pesticides: Risks Remain Uncertain While Prohibited Safety Claims Continue* (1990) (reporting that 32 of the 34 most widely used lawn care pesticides had not been reassessed for their long-term health risks) and *Labeling of Pesticides: Report of Audit No. E1EPF1-05-0429-2100613, supra*.

[18] At that time, Congress amended FIFRA's preemption provisions by adding the heading "Uniformity" to § 136v(b). Other than this cosmetic change, however, Congress did not address the preemption issue. Under well-established rules of construction, this non-substantive amendment indicates Congressional ratification of *Ferebee*. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

pesticide labels (particularly compared to the specific labeling commands that Congress gives cigarette manufacturers) confirms that § 136v(b) does not expressly preempt common law labeling claims. Under the FIFRA registration scheme, the drafting of the label is left to the registrant. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). Similarly, it is the registrant who decides that a label change is necessary, who drafts a revised label, and who submits it to the EPA for review. 40 C.F.R. § 152.44. Many label revisions require only EPA notification, not agency approval, 40 C.F.R. § 152.46(a), and some revisions do not require any EPA notification, such as changes in non-mandatory label statements, additions required by other federal laws, or changes in the label format. 40 C.F.R. § 152.46. *See also 40 C.F.R.* §§ 152.130(b) & (c); § 152.132(d)(5). Moreover, because the manufacturer drafts the label, different products containing the same active ingredient, whether manufactured by the same or a different company, may have different labels. *See, e.g., Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991). Thus, unlike the 1965 and 1969 Cigarette Acts, FIFRA does not mandate that all products containing a particular hazardous ingredient carry identical labels.

In sum, a fair reading of the statute in accordance with proper statutory analysis, along with an analysis of the statute's legislative history, lead to the conclusion that, in enacting FIFRA, Congress evinced no intent to preempt any state common law tort actions.

B. The Eleventh Circuit Failed To Conduct The Claim-By-Claim Analysis Required By *Cipollone* To Determine Whether There Is Congressional Intent To Preempt Specific Claims.

Assuming, *arguendo*, that the Eleventh Circuit was correct in concluding that FIFRA does expressly preempt some state common law claims, its next step should have been to evaluate whether FIFRA preempts the specific state common law tort claims at issue in this case. According to the plurality in *Cipollone*: "[W]e must fairly but -- in light of the strong presumption against pre-emption -- narrowly construe the precise language of ... [the provision concerning preemption] and we must look to each of petitioner's common law claims to determine whether it is in fact preempted." 112 S.Ct. at 2621. The analysis the Eleventh Circuit conducted did not meet this rigorous standard.

1. Non-"Label" Warning Claims Are Not Preempted.

Despite the contrary findings of the Ninth Circuit in *Allenby, supra*, and the Second Circuit in *Jorling, supra*, the Eleventh Circuit found no distinction between petitioners' claims concerning inadequate warnings on products' labels and inadequate warnings on material other than the product's label. Pet.App. 8a. In failing to make this distinction, the court did not follow *Cipollone*'s requirement that FIFRA's

statutory language be construed narrowly.[19] 112 S.Ct. at 2621. The proper analysis of a non-"label" claim, according to *Cipollone*, involves asking whether the claim would require the imposition under state law of requirements for labeling or packaging in addition to or different from those required under FIFRA. *Id*. The answer to this question lies in FIFRA's very clear definitions.

Section 136(p) of FIFRA defines "label" and "labeling" as follows:

> (1) Label. -- The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling. -- The term "labeling" means all labels and all other written, printed, or graphic matter --
>
> > (A) accompanying the pesticide or device at any time; or
> >
> > (B) to which reference is made on the label or in literature accompanying the pesticide or device ....

By definition, "label" and "labeling" are not addressed by the Papases' claim that Zoecon failed to warn consumers adequately through point-of-sale signs, consumer notices, and other off-label mechanisms. This non-"label" claim, therefore, cannot be preempted

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[19] *See also Bailey Farms, supra.*

because it cannot require the imposition of requirements for "labeling and packaging" in addition to or different from those required under FIFRA. *See Allenby, supra; Worm, supra*; and *Jorling, supra*.

2. Breach Of Implied Warranty Claims Are Not Preempted.

The Eleventh Circuit also failed to apply correctly the *Cipollone* analysis to petitioners' breach of implied warranty claim. According to the plurality opinion in *Cipollone*, the "requirements" imposed by an express warranty claim are not imposed under state law, but are imposed by the warrantor. 112 S.Ct. at 2622. This reasoning applies equally to implied warranties since implied warranty claims simply recognize that it was the intent of the manufacturer to offer a warranty, albeit not explicitly. *See, e.g., Brennan, supra*, 613 So.2d at 132. The Eleventh Circuit's attempt to distinguish implied warranties as imposed by the state, rather than the warrantor, ignores the fact that the purpose of an implied warranty claim is to hold the manufacturer accountable for a warranty that *it* made.

3. Misrepresentation Claims For Failure To Disclose A Material Fact To Consumers Are Not Preempted.

The Eleventh Circuit's dismissal of petitioners' claim that Zoecon misrepresented Paramite's safety by concealing benzene's presence from consumers further demonstrates the court's failure to apply *Cipollone's* principles correctly. The *Cipollone* Court concluded

that common-law claims for fraud and misrepresentation are not preempted under the 1969 Cigarette Act. In so concluding, it reasoned that these claims are not predicated on a duty "based on smoking and health," "but rather on a more general obligation, -- the duty not to deceive." 112 S.Ct. at 2624.[20] Likewise, the petitioners' claim that respondent owed them a duty not to conceal the presence of benzene in its product is not predicated on a requirement related to "labeling or packaging" but, as in *Cipollone*, on a more general duty not to deceive.[21] It should not be preempted.

4. Misrepresentation Claims Based On A Manufacturer's Failure To Comply With Federal Standards Are Not Preempted.

The decision below is also too broad because it improperly precludes a state cause of action based on the failure to comply with federal standards. Pet.App. 6a-7a. As the Fourth Circuit recognized in *Worm, supra*, 970 F.2d at 1308, FIFRA's preemption provision, § 136v(b), only preempts State-imposed labeling requirements that are "in addition to or different from" those imposed under FIFRA. Thus, even if § 136v(b) can somehow be read to apply to common law claims, it does not preempt common law claims that are wholly consistent with FIFRA's

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[20] *But see* Pet.App. 7a n.2.

[21] Similarly, an affirmative fraud claim, if formally alleged, would not be preempted.

requirements, such as a state cause of action based on the failure to comply with federal standards. *Id.*

Here, the Papases charge that Zoecon failed to inform the EPA that its product contained benzene and that there were safety risks due to benzene's presence. Under FIFRA, Zoecon's omission of significant health and safety information on the product label constitutes misbranding, which the EPA may prosecute. 7 U.S.C. § 136(f)(1)(G). Clearly, a state-imposed duty to maintain a label wholly consistent with FIFRA's misbranding standards requires nothing that is "in addition to or different from" what is already required by FIFRA itself. *Worm, supra,* 970 F.2d at 1309. Therefore, even if the Papases' other common law claims are preempted, a state tort claim predicated on the manufacturer's failure to comply with FIFRA should not be preempted.

III. None Of Petitioners' Claims Are Preempted Because Zoecon Failed To Provide Adequate Information To The EPA.

According to the evidence of record, the EPA did not know that Zoecon's product contained benzene when it registered it and approved its label. The Eleventh Circuit found, however, that the EPA's action still gives Zoecon immunity from liability for Mr. Papas' benzene poisoning. The absurdity and injustice of such a result demonstrates the extreme reach of the Eleventh Circuit's preemption ruling.

A pesticide manufacturer that submits inaccurate or incomplete information to the EPA undermines the

basic integrity of the regulatory scheme. It is inconceivable that Congress could have intended that a company be immune from personal injury or property damage liability in such a situation. To grant such immunity would mean that, if 10,000 people died from exposure to an ingredient that was not disclosed, their families could obtain no compensation for their deaths.

Such a grant of immunity, with its concomitant financial windfall, would *actually encourage* manufacturers to evade the regulatory system. It would make no sense for Congress to establish a regulatory system at all if it were to provide such a gaping, and lucrative, loophole through which manufacturers could slide.[22] This Court should review and reject the Eleventh Circuit's finding to the contrary.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

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[22] In similar circumstances, the Fifth Circuit declined to reach such an absurd result. In *Hurley, supra,* a case arising under the Food, Drug and Cosmetic Act, the court ruled that whether inadequate labeling claims are preempted turns on whether the manufacturer provided the FDA with all the necessary and available information.

Respectfully submitted,

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June 7, 1993

APPENDIX

PAPAS v. UPJOHN CO.

Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs-Appellants

v.

The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.

No.89-3752.

United States Court of Appeals,
Eleventh Circuit

March 8, 1993.

Appeal from the United States District Court for the Middle District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The facts of this case are set out in *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991)("Papas I"). We must decide whether, in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), appellants' state law claims against defendant Zoecon Corporation are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA").

Appellants Minas and Ollie Papas brought a diversity action against Zoecon Corporation seeking compensation for injuries Mr. Papas allegedly sustained due to exposure to pesticides manufactured by Zoecon. The Papases' complaint asserted liability based on negligence, strict liability, and breach of an implied warranty of merchantability. Each of those claims was, in whole or in part, a claim of inadequate labeling for alleged dangers arising from exposure to the pesticides. *Papas I*, 926 F.2d at 1020.

In *Papas I*, we reviewed the district court's partial grant of summary judgment in favor of defendants on the labeling claims. We affirmed, holding that "FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling." *Papas I*, 926 F.2d at 1026. We confined our analysis in *Papas I* to the doctrine of implied preemption. *Id.* at 1024. Later, the Supreme Court vacated the judgment in *Papas I* and remanded this case to us for further consideration in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *Papas v. Zoecon Corp.*, ___U.S. ___, 112 S.Ct. 3020,

120 L.Ed.2d 892 (1992). Having looked at *Cipollone*, we conclude that FIFRA expressly preempts the Papases' claims to the extent they are based on inadequate labeling or packaging.

I.

In *Cipollone,* the Supreme Court analyzed, for the claims in that case, the preemptive effect of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 ("the 1965 Act"), and its successor, the Public Health Smoking Act of 1969 ("the 1969 Act"). The Court found no cause to look beyond the express preemption provisions contained in section 5 of the 1965 and 1969 Acts.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indictum of congressional intent with respect to state authority', [citations omitted] 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation .... Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.

505 U.S. at ___, 112 S.Ct. at 2618. The Court then analyzed the pre-emption provisions of the 1965 and 1969 Acts to decide if the provisions expressly preempted the plaintiff's various claims. *Id.*

In the light of *Cipollone,* we will determine FIFRA's preemptive effect on the Papases' claims under the express pre-emption doctrine. Like the statutes at issue in *Cipollone,* FIFRA contains a provision explicitly addressing, and providing a reliable indictum of, state authority.[1] Congress specified the extent to which the states may regulate pesticides in FIFRA's section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered

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[1] *See Papas v. Upjohn Co.,* 926 F.2d 1019, 1022-24 (11th Cir. 1991), for our analysis of FIFRA's legislative history and regulatory scheme.

> pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator ....

7 U.S.C.A. § 136v (West 1980 & Supp.1992). To determine FIFRA's pre-emption of the Papases' claims we will "only identify the domain expressly preempted" by FIFRA section 136v. *See Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2618.

II.

Section 136v(b) preempts those of the Papases' state law claims which constitute "requirements for labeling or packaging in addition to or different from" the labeling and packaging requirements imposed under FIFRA. *Cipollone* convinces us that the term "requirements" in section 136v(b) "sweeps broadly and suggests no distinction between positive enactments and the common law." *Cipollone, at* ___, 112 S.Ct. at 2620. Common law damages awards are one form of state regulation and, as such, are "requirements" within the meaning of section 136v. *See Id; Taylor v. General Motors Corp.,* 875 F.2d 816, 824 n. 16 (11th Cir. 1989), *citing San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1969). To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's "labeling or packaging" failed to meet a standard "in addition to or different

from" FIFRA requirements, section 136v preempts the claims.

The Papases' concede that each of their negligence, strict liability, and breach of implied warranty counts alleges in part that Zoecon failed to warn users that its product contained certain harmful chemicals and failed to inform users to take appropriate precautionary measures. Those allegations, like the failure to warn claims in *Cipollone,* require the finder of fact to determine whether, under state law, Zoecon adequately labelled and packaged its product. This inquiry is precisely what section 136v forbids. FIFRA denies states the authority to require that pesticide manufacturers conform to a state law standard of care in their labelling and packaging practices. Thus, to the extent that the Papases' claims require a showing that Zoecon's labelling or packaging "should have included additional, or more clearly stated, warnings, those claims are preempted." *See Cipollone,* 505 U.S. at _____, 112 S.Ct at 2621-22. Thus the *Cipollone* opinion dictates, under an express preemption analysis, the same result we reached earlier under the implied pre-emption doctrine. *Cf. Papas I, supra,* 926 F.2d 1026.

III.

The Papases say that they seek to prove Zoecon *failed to disclose* to the Environmental Protection Agency ("EPA"), the agency which administers FIFRA, that Zoecon's product contained benzene. The Papases contend that this alleged omission subjects Zoecon to an agency enforcement

action for "misbranding,"[2] and they urge that common law damages awarded on this omission theory would not constitute a "requirement ... in addition to or different from" FIFRA requirements. We reject this argument. As we noted in *Papas I,* it is for the EPA Administrator, not a jury, to determine whether labelling and packaging information is incomplete or inaccurate, and if so what label changes, if any, should be made. *See Papas I, supra,* 926 F.2d at 1026 n. 8. States may not interfere with the methods designed by Congress to achieve FIFRA's goals. *See Gade v. National Solid Wastes Management Association,* ___ U.S. ___, ___, 112 S.Ct. 2374, 2385, 120 L.Ed.2d 73 (1992). We think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures.

IV.

Appellants urge us to hold that their warning claims "unrelated to labelling and packaging" are not pre-empted by section 136v. They contend that because the language of 136v refers only to "labelling or packaging," the section does not preempt failure to warn claims based on point-of-sale signs, consumer

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[2] Under FIFRA, a pesticide is misbranded if the label does not contain warnings and directions for use which, if complied with, are "adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(l)(F)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded. 7 U.S.C. § 136j(a)(1)(E). Because appellants "misbranding" theory is inseparable from FIFRA procedural requirements, we find no merit in appellants' contention that this theory of recovery is based on a generalized "duty not to deceive." *Cf. Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2624.

notices, or other informational materials that are "unrelated" to labelling and packaging. But any claims that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff necessarily challenge the adequacy of the warnings provided on the product's labelling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also preempted by FIFRA.

V.

The Supreme Court ruled that the *Cipollone* plaintiff's express warranty claims were not preempted by the 1969 Act. The Papases argue that this aspect of *Cipollone* mandates a finding of no preemption on their breach of *implied* warranty claim. We disagree.

In *Cipollone,* four Justices concluded that "the 'requirements' imposed by an express warranty claim are not 'imposed under State law,' but rather imposed *by the warrantor.*" *Cipollone, supra,* 505 U.S. at ___, 112 S.Ct. at 2622. On the basis of that reasoning, the plurality concluded that Cipollone's breach of

express warranty claim was not pre-empted by the 1969 Act. *Id.* at ___, 112 S.Ct. at 2622-23. But an implied warranty is a requirement imposed under state law and is pre-empted by FIFRA.

Express warranties are promises that are made in some, but not all, sales contracts. Express warrantors seek competitive advantage by promising buyers that certain factual representations about their goods are true. Liability for breach of an express warranty has a voluntary quality, it "derives from, and is measured by, the terms of that warranty." *Cipollone,* at ____, 112, S.Ct. at 2622.

In contrast, implied warranties of merchantability arise by operation of law. *See Wagner v. Mars, Inc.*, 166 So.2d 673 (Fla.App.1964); *Atlantic Distributors, Inc. v. Alson Mfg. Co.*, 141 So.2d 305 (Fla.App.1962). Florida has codified the implied warranty of merchantability, which, unless waived or modified, is always implied in a sale of goods by a merchant and includes the statutory requirement that goods "are adequately contained, packaged, and labeled as the agreement may require." Fla.Stat.Ann § 672.314 (1992). Although liability for breach of an express warranty may be viewed as "imposed by the warrantor," *Cipollone,* 505 U.S. at ___, 112 S.Ct. at 2622, liability for breach of an *implied* warranty is based on "the agreement, *imposed by law,* to be responsible in the event the thing sold is not in fact fit for the use and purposes intended." *Arcade Steam Laundry v. Bass,* 159 So.2d 915 (Fla.App.1964) (emphasis added). In essence, when plaintiffs argue that an implied warranty obligates the seller, plaintiffs

acknowledge that the seller did not volunteer for the liability.

FIFRA preempts claims based on requirements imposed *by states.* 7 U.S.C. § 136v(b). If Zoecon were to have liability for breach of an *implied* warranty of merchantability, that liability would not be self-inflicted. Instead, that liability would be based on a requirement imposed by state law. Therefore, to the extent the implied warranty claim depends upon inadequacies in labelling or packaging, FIFRA section 136v preempts the claim.

VI.

We conclude that FIFRA expressly preempts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging. To the extent that appellants' negligence, strict liability, and breach of implied warranty claims require a showing that Zoecon's labeling and packaging caused the alleged injury, those claims are preempted by FIFRA. Claims that do not challenge Zoecon's labeling and packaging practices are not pre-empted.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3752

District Court No. 88-00116-Civ.

MINAS H. PAPAS, OLLIE M. PAPAS,
his wife,

Plaintiffs-Appellants,

versus

THE UPJOHN COMPANY, a Delaware
corporation qualified to do
business in the State of Florida,
ZOECON CORPORATION, a Delaware
corporation currently doing
business in the State of Florida,

Defendants-Appellees.

Appeal from the United States District
Court for the Middle District of Florida

Before ANDERSON and EDMONDSON, Circuit Judges,
and MORGAN, Senior Circuit Judge.

JUDGMENT ON REMAND
FROM
THE SUPREME COURT OF
THE UNITED STATES;

This cause came to be heard on remand from the Supreme Court of the United States;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in the light of Cipollone v. Liggett Group, Inc., 505 U.S. ___, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

Entered: March 8, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Deputy Clerk

RE-ISSUED AS MANDATE: May 18, 1993.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MINAS H. PAPAS and OLLIE M. PAPAS, his wife,

Plaintiffs,

vs. Case No.88-116-Civ-J-14

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, and ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants.

ORDER AND PARTIAL SUMMARY JUDGMENT

I. Defendant's Motion For Partial Summary Judgment

This case came on to be heard on Defendant Zoecon Corporation's Motion For Partial Summary Final Judgment, filed April 10, 1989; Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989; and plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989. The Court heard oral argument on May 26, 1989.

Defendant Zoecon argues that plaintiffs' claims for negligence, strict liability, and implied warranty are preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, *et seq.*, [hereinafter "FIFRA"], to the extent that the claims are based on defendant's failure to warn about the dangers of Paramite. The Court shall review the legislative history of FIFRA and determine whether or not FIFRA preempts plaintiff's claims based on defendant's failure to warn.

A. Standard To Be Applied On Summary Judgment

A district court's review of a case on a motion for summary judgment is governed by Fed.R.Civ.P. 56. A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the district court that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Fed.R.Civ.P. 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. 477 U.S. at 325. When a moving party has so discharged its burden, the nonmoving party must then "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

The district court must enter summary judgment "after adequate time for discovery and upon motion,

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 322; Fed.R. Civ.P. 56(c). *See also Reflectone, Inc. v. Farrand Optical Co., Inc.* 862 F.2d 841, 843-4 (11th Cir. 1989). Whether or not the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, requires the court to draw inferences from the evidence as viewed in the light most favorable to the nonmoving party, and to resolve all reasonable doubts in that party's favor.

The Eleventh Circuit Court of Appeals explained the reasonableness standard in *WSB-TV v. Lee,* 842 F.2d 1266, 1270 (11th Cir. 1988):

> In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." ... The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts.... When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

842 F.2d at 1270 (citations omitted).

Fed.R.Civ.P. 56(c) requires the district court to deny a motion for summary judgment if the court finds that there exists a genuine issue for trial. What constitutes a "genuine issue for trial" was addressed by the Supreme Court in *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986). In *Anderson*, the Court stated that "summary Judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. The Court further stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52.

The Court finds that the parties have had adequate time to conduct discovery in this case. The Court will, therefore, address the motion for partial summary judgment.

B. Preemption Of State Tort Law By FIFRA

1. The Concept of Federal Preemption

The doctrine of preemption is based on Article VI, Clause 2 of the United States Constitution which provides:

> The Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Preemption is deemed mandatory when Congress expresses a clear intent to preempt state law, where there is a conflict between state and federal law, where compliance with both state and federal law is impossible, where federal law implicitly bars state regulation, where Congress has legislated comprehensively, or where state law serves as an obstacle to federal objectives. *Public Service Commission v. Federal Communications Commission,* 476 U.S. 355, 368-69 (1986) *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984). This Court has recognized that, in deciding whether a federal statute preempts state law, "the Court must ascertain Congressional intent in enacting the federal statute at issue." *Blue Cross and Blue Shield of Florida. Inc. v. Department of Banking and Finance,* 613 F. Supp. 188, 191 (M.D.Fla. 1985), *aff'd* 791 F.2d 1501 (11th Cir. 1986). An analysis of the legislative history and the specific provisions of FIFRA reveals that in enacting FIFRA Congress expressly intended to preempt state labeling requirements.

2. Legislative History of FIFRA

FIFRA represents the federal government's detailed comprehensive system for the strict regulation of pesticides. FIFRA was enacted in June, 1947, to replace and expand the protection afforded by the Insecticide Act of 1910, the first federal act regulating the pesticide industry. H.R. Rep. No. 313, 80th

Cong., 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1200, 1201. The 1947 Act gave the United States Department of Agriculture authority over the regulation, registration and labeling of "economic poisons and devices."

In 1972, FIFRA was completely revised. Responsibility for enforcement of FIFRA was transferred from the Department of Agriculture to the newly created Environmental Protection Agency [hereinafter "EPA"]. The two major goals of the 1972 revisions were to "regulate the use of pesticides to protect man and his environment" and to "extend Federal pesticide regulations to actions *entirely within a single State*." S. Rep. No. 92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993 (emphasis added). The intent to create a comprehensive regulatory statute is demonstrated by the President's environmental message included in the Senate report on the proposed 1972 Act. It noted, in pertinent part, that:

> Currently, Federal controls over pesticides consist of the regulation of the registration and labeling requirements of the Federal Insecticide, Fungicide and Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is no authority to deal with the actual use of pesticides. The labels approved under the Act specify uses to which pesticide may be put, but there is no way to insure that the label will be read or obeyed.

> The comprehensive strengthening of our pesticide control laws is needed.

S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4093-94.

Both the House and Senate bills explicitly detail the desire for federal preemption concerning labeling. The House bill provides:

> Section 23. AUTHORITY OF STATES
>
> Subsection (b) *preempts any State labeling or packaging requirements* differing from such requirements under the Act.

H.R. 10729, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4010, 4021 (emphasis added). Similarly, the Senate bill provides:

> Section 24. AUTHORITY OF STATES
>
> Subsection (b) *preempts any State or local government labeling or packaging requirements* differing from such requirements under the Act.

S. Rep. No. 92-970, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 4092, 4128 (emphasis added). Therefore, it is clear that the express intent of Congress in enacting the 1972 revisions to FIFRA was to preempt state regulation of labeling requirements. The authority to promulgate such regulations was reserved exclusively for the EPA.

3. Preemption Of State law By FIFRA

FIFRA is explicit as to the preemption of state authority to regulate pesticide labeling. It specifically provides that:

> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). The statutory language of FIFRA creates a prohibition of "any requirements for labeling" by states. Similarly FIFRA'S legislative history demonstrate a definitive congressional mandate that the regulation of pesticide labeling be controlled solely by the EPA.[1] It is clear that Congress has legislated comprehensively, barring the states from interfering with the regulation of pesticide labels.

4. Judicial Precedent in Support of FIFRA Preemption

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[1] Pursuant to FIFRA, the EPA has enacted a series of regulations. Pursuant to 7 U.S.C. § 136a(c)(5)(C), the administrator of the EPA shall register a pesticide if he determines, *inter alia,* that it will perform its intended function without "unreasonably adverse effects" on man or the environment. A pesticide that is duly registered with the EPA must bear a label which contains EPA-approved warnings that the product is adequate to protect health and the environment. 7 U.S.C § 136(q)(1)(G). Moreover, a label cannot contain language that is not approved by the EPA. 40 C.F.R. 162.10(a) Pursuant to the regulations promulgated under FIFRA, the EPA not only specifies the particular warning language required, *see* 40 C.F.R. § 162.10(a)(1), but also the type size, *see* 40 C.F.R. 162.10(a)(2)(ii)(A), color, *see* 40 C.F.R. 162.10 (a)(2)(ii)(B), and placement, *see* 40 C.F.R. 162.10(a)(4), of the warning and all other specifications concerning labeling.

FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald v. Mallinckrodt,* 681 F.Supp. 404 (E.D.Mich. 1987). In *Fitzgerald* plaintiff alleged personal injuries resulting from his exposure to defendant's chemical product, Calo-Clor, during the course of his employment. Calo-Clor is an inorganic mercury-based fungicide which was registered with the EPA pursuant to FIFRA.

In granting summary judgment to the defendant on the basis of preemption, the Court recognized that in enacting FIFRA "Congress had *enacted a comprehensive system* for the registration and labeling of pesticides." 681 F.Supp. at 406 (emphasis added). The Court determined that "any state law tort recovery based on failure to warn theory, would abrogate the Congress' intent to provide uniform regulations governing the labeling of pesticides." *Id.* at 407.

In reaching its conclusion that state tort claims were preempted by FIFRA, the Court in *Fitzgerald* considered and rejected an earlier contrary holding in *Ferebee v. Chevron Chemical Company,* 736 F.2d 1529 (D.C. Cir.), *cert. denied,* 469 U.S. 1062 (1984). Instead, the court relied on the recent holding in *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987), *cert. denied,* 1989 U.S. LEXIS 338, where the First Circuit reasoned that a finding that a label is inadequate under a state tort theory,

> effectively compels the manufacturer to alter its warning to conform to different state law

> requirements as "promulgated" by a jury's findings.... This challenge to the federal warning label's sufficiency--surely contravenes the Act's policy of uniform labeling.... Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies.

Fitzgerald, 681 F.Supp. at 407, (*quoting Palmer v. Liggett Group. Inc.,* 825 F.2d at 627-28). *See also Cipollone v. Liggett Group. Inc.,* 789 F.2d 181 (3rd Cir. 1986)(finding the Federal Cigarette Labeling and Advertising Act preempts state tort claims based on alleged inadequacy of warnings).

The reasoning of *Fitzgerald* applies in this action. To permit additional labeling requirements to be imposed under state common law "would effectively authorize the state to do through the back door" that which was expressly preempted through the front. *Fitzgerald,* 681 F. Supp. at 407.

Plaintiffs' argument against preemption is primarily based upon *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA does not preempt state tort actions based on the inadequacy of an EPA-approved label. Central to the decision in *Ferebee* was the determination that a state court jury verdict does not automatically "require" a manufacturer to change its labels, but rather leaves to the manufacturer the "choice of how to react" to such jury verdict. *Id.* at 1542. ("Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort

plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.")

This Court must reject any argument holding that a state court jury verdict would merely leave to the manufacturer the "choice of how to react" to such jury verdict and would not automatically "require" a manufacturer to change its labels. As the First Circuit noted in *Palmer:*

> *This "choice of reaction" seems akin to the free choice of coming up for air after being underwater.* Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. *The most obvious change it can take, of course, is to change its label.*

Palmer v. Liggett Group, 825 F.2d at 627-28 (emphasis added).

This "choice of reaction" analysis was expressly considered and rejected in *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987), in which it was held that FIFRA preempts state tort actions based on the inadequacy of an EPA-approved label. Most recently, the "choice of reaction" analysis has been rejected by the United States Supreme Court in *International Paper Company v. Ouellette,* 479 U.S. 481 (1987).

Ouellette involved an action against a paper mill located in New York State that discharged effluent into Lake Champlain pursuant to a discharge permit issued under the Clean Water Act, 33 U.S.C. § 1251, *et seq*. Plaintiffs, residents of Vermont, filed suit against the paper mill alleging that the discharge constituted a common-law nuisance under Vermont law. A preemption argument was raised based upon the Clean Water Act's prohibition of state regulation of an out-of-state "source" of discharged effluent. The Supreme Court held that the Clean Water Act preempted the common-law nuisance action. In doing so, the Court noted:

> The affected state's nuisance laws would subject [International Paper] to the threat of legal and equitable penalties.... Such *penalties would compel the source* to adopt different control standards and a different compliance schedule from those approved by the EPA....

Ouellette, 479 U.S. at 495 (emphasis added). Additionally, the Court held that:

> If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, *at a minimum* [International Paper] *would have to change* its methods of doing business and controlling pollution to avoid the threat of ongoing liability .... The inevitable result of such suits would be that Vermont and other states could do indirectly what they could not

> do directly -- regulate the conduct of out-of-state sources.

Id. (emphasis added).

Although the Eleventh Circuit Court of Appeals has not specifically considered whether or not FIFRA preempts state common law torts that impose requirements for insecticide labels, the court has in a recent case affirmed the principle that a State regulates by creating common law tort claims just as it does by creating other forms of preventive relief. *See Taylor v. General Motors Corp.*, No. 87-5879 (11th Cir. June 14, 1989). The court held that the National Traffic and Motor Vehicle Safety Act impliedly preempted state tort law. The court came to this conclusion even in the face of a "savings clause" which stated that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* at 2978 (quoting 15 U.S.C. § 1397(c).

The preemption of state tort law by FIFRA is even stronger than the preemption found in *Taylor*. In this case, Congress has expressly preempted state law. Furthermore, Congress has not provided a savings clause that would revive any common law remedies that regulate insecticide labels.

The Court finds, therefore, that a state court jury verdict would have the effect of "regulating" the content of a warning label. Since FIFRA expressly preempts state law regulation of pesticide labeling,

plaintiffs' state law claims fail to the extent that they are based on defendant's failure to warn.

5. Approval Of Defendant's Labels By The EPA

Plaintiffs argue that the defendant has not established that the EPA approved its labels and that absent such approval, the preemption defense is not established. Plaintiffs specifically object to the defendant's introduction of the affidavits of individuals who do not have personal knowledge of whether or not the EPA approved defendant's labels.

The Court disagrees with plaintiffs' implicit assumption that the preemption defense requires a showing that the EPA actually approved defendant's labels. At most, such a showing would establish that the defendant violated federal regulations concerning labeling. Such a showing would not negate the fact that Congress has expressly preempted state regulation of labeling through a specific expression to that effect by statute. The Court finds that various affidavits submitted by the defendant to show that the EPA approved its labels are irrelevant to this proceeding and have no bearing on this Court's finding of preemption.

6. Necessary And Available Information

The Court disagrees with plaintiffs' argument that preemption requires defendant to show that they have provided to the regulatory agency all the necessary and available information on which to base

a warning. A showing that the EPA approved defendant's labels based on inadequate information would not negate a finding that under the law of preemption, the EPA has the exclusive right to regulate those labels. A showing that the EPA based its decision on inadequate information would be appropriate if, for example, the agency approval of defendant's labels were offered for its collateral estoppel effect. This court's finding of preemption is not based on collateral estoppel or on the agency's approval of the defendant's labels.

The Court's finding of preemption in this case is based on the fact that Congress expressly preempted state law. If Congress has taken away the ability of the states to regulate labels and assigned the regulation of labels to a federal agency, Congress has determined that such an assignment promotes the general welfare. Whether that federal regulatory agency carries out its function based on all available and necessary information is, therefore, irrelevant to a preemption inquiry. This court cannot second guess the wisdom of that decision. A cause of action based on insufficient labeling would subvert the regulatory scheme for pesticide labeling. Such a cause of action would permit states to regulate labels in the guise of an action for damages and violate Congress's expressed mandate that state's should not regulate labels.

C. Plaintiffs' Remaining Claims: Defectiveness And Unreasonable Dangerousness Under Non-Warning Theories

In Florida the elements of a cause of action for strict liability in tort are 1) the manufacturer's relationship to the product in question, 2) the defective and unreasonably dangerous condition of the product, and 3) the existence of the proximate causal connection between such condition and the user's injuries or damages. *West v. Caterpillar Tractor Company. Inc.,* 336 So.2d 80, 87 (Fla. 1976). The elements of a cause of action in a negligence products liability case are 1) the existence of a duty on the part of the defendant to protect the plaintiff from injury or damage of which plaintiff complains, 2) the failure of the defendant to perform that duty, and 3) injury or damage to plaintiff proximately caused by such failure. *Blackton Building Supply Co. v. Garesche,* 383 So.2d 250, 251 (Fla. 5th DCA 1980). In practice, the causes of action for strict liability in tort and negligence are similar, and both require proof that the defendant's product was defective and unreasonably dangerous. *See Witt v. Norfe. Inc.,* 725 F.2d 1277-79 (11th Cir. 1984).

Florida law recognizes that the defective and unreasonably dangerous condition of a product can be established by showing that a product contained a manufacturing flaw, *see Matter of Standard Jury Instr. (Civil Cases),* 435 So.2d 782, 782-83n.* *(citing* Restatement (Second) of Torts, § 402A, comment k,

(1965)), or by showing that a product contained a design defect. Id. It appears that Florida courts have not spoken definitively as to whether or not a manufacturer's failure to warn can constitute a ground for finding a product defective and unreasonably dangerous. *See id.,* 435 So.2d at 783 n.*.

This Court assumes without deciding that Florida law would recognize that a manufacturer's failure to warn could at least under certain conditions render a product defective and unreasonably dangerous. Although this Court is aware that other jurisdictions have found that a manufacturer's failure to warn can constitute an independent ground for finding a product to be defective and unreasonably dangerous, *see 2 American Law of Products Liability 3d,* Part 5, Chapter 17, § 17:3, n.9 (T.E. Travers ed. 1987), this Court's ruling should not be interpreted as any extension of Florida law on this issue. In light of the Court's conclusion that any cause of action based on the defendant's failure to warn is preempted, the existence of the cause of action in the first instance is immaterial to the Court's decision.

The Court finds that plaintiffs' theory for finding the products defective and unreasonably dangerous is not based exclusively on defendant's failure to warn, but on a theory that products containing Paramite have design defects and/or manufacturing flaws. To the extent that plaintiffs' claims are based on the defective and unreasonably dangerous condition of defendant's products due to defendant's failure to warn, plaintiffs' claims are preempted as a matter of law. To the extent that plaintiffs' claims are

otherwise based on the defectiveness or unreasonable dangerousness of defendant's product on theories of defective design or manufacturing flaw, the plaintiffs' claims remain viable.

This Court stresses that this opinion does not address any issue not raised and briefed by the parties. In particular, the parties have not addressed the question whether or not the defendant can assert its warnings as a defense to plaintiffs' remaining claims, or whether or not the assertion of a defense of warning is preempted by FIFRA.

II. Interlocutory Appeal

The Court finds that this order and partial judgment, although interlocutory in character, involves a controlling question of law as to which there is substantial ground for difference of opinion and upon which an immediate appeal from the order may materially advance the ultimate termination of the litigation. In particular, the Court finds that whether or not FIFRA expressly preempts state products liability law is such a question. The Court so certifies pursuant to 28 U.S.C. § 1292(b).

The Court reminds the parties that either or both of them have ten (10) days from the date of this order in which to file an application under 28 U.S.C. § 1292(b) for the Court of Appeals to review this order and partial judgment. If either of the parties file such an application with the court of appeals, this Court shall stay all proceedings in this case pending the disposition of the § 1292 application by court of

appeals and any interlocutory appeal which that court may entertain.

III. Plaintiffs' Remaining Motions

As to Plaintiffs' Motion For Leave To File Amended Complaint And For leave To Join Koch Refining Company As Defendant, filed May 24, 1989, the Court finds that the Amended Complaint attached to the motion contains claims based on defendant's failure to warn. The Court also notes that the ultimate contents of the complaint may be affected by a possible interlocutory appeal.

The Court will, therefore, deny the motion to file the amended complaint attached to the motion. The Court will, however, give plaintiffs leave to file an amended complaint subsequent to the court of appeals' decision on any application for interlocutory appeal and subsequent to any interlocutory appeal that the court of appeals may thereupon entertain.

Accordingly, it is

ORDERED and ADJUDGED:

1. That Defendant Zoecon Corporation's Motion for Partial Summary Final Judgment, filed April 10, 1989, is granted.

2. That judgment is hereby entered for defendant Zoecon and against the plaintiffs to the extent plaintiffs' claims are based on the defendant Zoecon's failure to warn.

3. That Plaintiffs' Motion For Leave To File Amended Complaint And For Leave To Join Koch Refining Company As Defendant, filed May 24, 1989, is denied.

4. That plaintiffs' Motion To Defer Consideration And Ruling Upon Defendant Zoecon's Motion For Partial Summary Judgment, filed May 24, 1989, is denied.

5. That this Court hereby certifies that this order and partial judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal under 28 U.S.C. § 1292(b) would materially advance the ultimate termination of the litigation.

6. That either or both parties may within ten (10) days from the date of this order file an application under 28 U.S.C. § 1292(b) with the court of appeals to review this order and partial judgment.

7. That if either plaintiff or defendant Zoecon should file a §1292(b) application with the court of appeals, all proceedings in this case shall thereupon be stayed pending the disposition of the § 1292 application and any interlocutory appeal which the court of appeals may thereupon entertain.

8. That if the court of appeals accepts jurisdiction over the interlocutory appeal, the pretrial conference set for December 19, 1989, shall automatically be cancelled until further order of the Court, and the parties shall automatically be relieved

from being required to file a pretrial stipulation until further order of the Court.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of Aug., 1989.

/s/ SUSAN H. BLACK
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Garry Randolph, Courtroom Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-2167

MINAS H. PAPAS and
OLLIE M. PAPAS, his wife,

Petitioners,

versus

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida,
ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Respondents.

Application for Permission to Appeal
from the United States District Court
for the Middle District of Florida

Before RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. Section 1292(b) is GRANTED.

Minas H. PAPAS, Ollie M. Papas, his wife, Plaintiffs-Appellants

v.

The UPJOHN COMPANY, a Delaware corporation qualified to do business in the state of Florida, Zoecon Corporation, a Delaware corporation currently doing business in the State of Florida, Defendants-Appellees.

No. 89-3752.

United States Court of Appeals,
Eleventh Circuit.

Feb. 28, 1991.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Minas and Ollie Papas ("Papas") filed a diversity action in federal district court against the Upjohn Company and Zoecon Corporation. The complaint alleged that Minas, while working for a humane society, had applied certain pesticides manufactured by Upjohn and Zoecon to dogs to rid the dogs of fleas, ticks, and other pests. The complaint also alleged that these chemical products caused him to suffer health problems. The complaint sounded in negligence, strict liability, and breach of implied warranty of merchantability, and included a derivative claim for loss of consortium. The three main counts were, in whole or in part, claims of inadequate labeling in the light of alleged dangers arising from exposure to the pesticides.

Zoecon moved for partial summary judgment on the labeling claims. It argued that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y ("FIFRA"), under which its product is registered, preempted such claims. The district court agreed and granted Zoecon's motion. Having determined that this issue involves a controlling question of law on which there are substantial grounds for difference of opinion[1] and that

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[1] Only one federal appellate court has considered the issue in *Ferebee v. Chevron Chemical Company,* 736 F.2d 1529 (D.C.Cir.1984), the court concluded that FIFRA did not preempt state common law tort suits based on inadequate labeling. District courts are split on the issue. Cases finding preemption include *Hurt v. Dow Chem. Co.,* No. 90-0783-C(3)(E.D.Mo. Sept. 28, 1990); *Kennan v. Dow Chem. Co.,*717 F.Supp. 799 (M.D.Fla. 1989); *Fisher*

an immediate appeal would materially advance the ultimate determination of the litigation, the district court certified the matter for interlocutory appeal, pursuant to 28 U.S.C.A. § 1292(b). We granted the petition to appeal, and the appeal followed. We conclude that state common law tort claims for inadequate labeling are impliedly preempted by FIFRA and, accordingly, affirm the district court's grant of partial summary judgment.

I. THE DOCTRINE OF FEDERAL PREEMPTION

Federal preemption of state law is based on the supremacy clause of the Constitution:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

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v. Chevron Chem. Co., 716 F.Supp. 1283 (W.D.Mo. 1989); *Herr v. Carolina Log Bldgs., Inc.*, No. EV 85-262-C (S.D.Ind. Dept. 22, 1989); *Watson v. Orkin Exterminating Co.*, No. JFM-88-2427 (D.Md.Nov. 8, 1988); and *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D.Mich. 1987). Cases in which district courts found no preemption include *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F.Supp. 1474 (D.Colo. 1990); *Evenson v. Osmose Wood Preserving, Inc. & American Wood Preservers Inst.*, No. IP 87-383-C (S.D.Ind. Sept. 18, 1990); *Stewart v. Ortho Consumer Products*, 1990 WL 36129 (E.D.La. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F.Supp. 85 (E.D.Pa. 1989); *Whitner v. Reilly Indus., Inc.*, No. 87-5224 (S.D.Ill. 1989); *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D.Ill. 1988); and *Wilson v. Chevron Chem. Co.*, 1986 WL 14925 (S.D.N.Y. 1986).

> Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Art. VI, cl.2. Preemption can be either express or implied; it "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)(quoting *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

Preemption can be inferred

(1) "when there is outright or actual conflict between federal and state law;"

(2) "where compliance with both federal and state law is in effect physically impossible;"

(3) "where there is implicit in federal law a barrier to state regulation;"

(4) "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or

(5) "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress."

Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 368-69, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986)(citations omitted); *see also International Paper Co. v. Ouellette,* 479 U.S. 481, 491-92, 107 S.Ct. 805, 811, 93 L.Ed.2d 883 (1987); *Hillsborough County, Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *De La Cuesta,* 458 U.S. at 153, 102 S.Ct. at 3022; *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-26 (11th Cir. 1989); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987). A state law -- even if it has the same ultimate goal as a federal law -- may stand as an obstacle to the full implementation of a federal law and therefore be preempted "if it interferes with the methods by which the federal statute was designed to reach this goal." *Ouellette,* 479 U.S. at 494, 107 S.Ct. at 813.

The principle of implied preemption "applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule." *Taylor,* 875 F.2d at 826 (citations omitted). *Accord Ouellette,* 479 U.S. at 494-95, 499 n. 20, 107 S.Ct. at 813, 815 n. 20 (state nuisance suits preempted by Clean Water Act); *Louisiana Public Service Comm'n,* 476 U.S. at 369, 106 S.Ct. at 1898-99 (federal agency action may preempt state regulation); *Automated Med. Labs.*, 471 U.S. at 713, 105 S.Ct. at 2375 (federal regulations can preempt state law); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986)(state common law damage actions can have effect of imposing requirements which create obstacle to accomplishment of "full purposes and objectives of

Congress")(decision and reasoning adopted by Eleventh Circuit in *Stephen v. American Brands, Inc.*, 825 F.2d at 313). Thus, we have recognized that the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor,* 875 F.2d at 824 n. 16 (citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)).

The critical question in considering whether state law is preempted by federal law is Congressional intent -- that is, "whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n,* 476 U.S. at 369, 106 S.Ct. at 1899. "[I]n implied preemption analysis it is possible to infer preemptive intent solely from effects": even if statutory language or legislative history is unclear, federal law preempts state law if "the ordinary application of the two laws creates a conflict." *Taylor,* 875 F.2d at 826.

II. THE FIFRA SCHEME OF PESTICIDE REGULATION AND LABELING

FIFRA, initially enacted in 1917, was completely revised in 1972, when the responsibility for its enforcement was transferred to the Environmental Protection Agency ("EPA") from the Department of Agriculture. The Senate Committee on Agriculture and Forestry, to which the bill was referred, identified two purposes of the 1972 revisions to FIFRA: to "(A) regulate the use of pesticides to protect man and his environment; and (B) extend Federal pesticide

regulation to actions entirely within a single State." S.Rep. No.92-838, 92d Cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993. At that time, FIFRA was amended to define "protect health and the environment" and "protection of health and the environment" as "protection against any unreasonable adverse effects on the environment." 7 U.S.C.A. § 136(x). "Unreasonable adverse effects on the environment" was, in turn, defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C.A. § 136(bb).

FIFRA's legislative history indicates that Congress intended to establish a comprehensive regulatory scheme in which the EPA Administrator would be responsible for determining whether to register a pesticide and, if so, under what circumstances. Congress recognized that the control of pesticides required a careful balancing of benefit against risk:

> While appropriate pesticides properly used are essential to man and his environment, many constitute poisons that are too dangerous to be used for any purpose. Others are dangerous unless used extremely carefully ... Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.

S.Rep. No. 92-838, 92d Cong. 2d *Sess., reprinted* in 1972 U.S. Code Cong. & Admin. News at 3996. The EPA administrator was designated as the entity to conduct the balancing analysis:

> The question [the Administrator] must decide is "Is it better for man and the environment to register this pesticide, or is it better that this pesticide be banned?" He must consider hazards to farmworkers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain when it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort and health of man. All these factors he must consider, giving each its due. No one should be given undue consideration, no one should be singled out for special mention, no one should be considered a "vital" criterion.
>
> For each pesticide the Administrator must ask the same question .... In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.

Id. at 4032-33. Under FIFRA, the Administrator is required to register a pesticide if he determines that, when considered with any restrictions imposed on it, the pesticide warrants the proposed claims made for

it; its labeling and other materials comply with FIFRA requirements; it will perform its intended purpose without unreasonable adverse effects on the environment; and when used in accordance with common practice, it will not generally cause unreasonable adverse effects on the environment. *See* 7 U.S.C.A. § 136a(c)(5).

In this comprehensive regulatory scheme for pesticides, Congress delineated the extent to which the states could regulate pesticides in section 136v:

> § 136v. Authority of States
>
> (a) In General
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (c) Additional Uses
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and

> use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator ....

7 U.S.C.A. § 136v (West 1980 & Supp. 1990) (subsection headings added by 1988 amendment).

The statute's language, by itself, is a powerful limit on state power over labeling. A report accompanying the bill, as originally reported out of the House Committee, also indicated the limits on state power due to the division of authority between the federal and state governments: "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard to labeling and packaging." H.R.Rep. 92-511, 92d Cong. 1st Sess. 16 (1971). Congress recognized that, while the intent of this provision was "to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act," subsection (b) preempted "any State labeling or packaging requirements differing from such requirements under the Act." S.Rep. 92-838, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News at 4021 (emphasis supplied); *see also* S.Rep. 92-970, 92d Cong.2d Sess., *reprinted in* 1972 U.S.Code Cong. & Admin.News 4092, 4128.

FIFRA directs that States "shall not impose or continue in effect any requirements for labeling or packaging" beyond the requirements imposed by FIFRA. Given FIFRA's words and its legislative history, FIFRA may expressly preempt state common law actions of the kind before us, just as FIFRA preempts other legal requirements in the form of state statutes and regulations. But, mindful that "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires," *Taylor,* 875 F.2d at 824, we admit to a little uncertainty and pass over the question of express preemption. Instead, we will decide whether federal preemption of state common law tort claims based on labeling deficiencies can be inferred from FIFRA and the labeling regulations promulgated under it.

III. STATE COMMON LAW TORT LABELING CLAIMS IMPLIEDLY PREEMPTED BY FIFRA

Under FIFRA, the federal government -- through the EPA -- has the sole and exclusive right to regulate pesticide labels. While states can regulate the sale or use of federally registered pesticides, no state can "impose or continue in effect any requirements for labeling or packaging [of pesticides] in addition to or different from" those required by FIFRA. 7 U.S.C.A. § 136v(b).

In 40 C.F.R. Part 156, the EPA has regulated almost every aspect of pesticide labeling. The EPA specifically regulates the manner in which warnings and precautionary statements for the pesticides are to

be presented and provides specific requirements about the content, placement, type size, and prominence of the warnings and precautionary statements. *See* 40 C.F.R. § 156.10(h) (1990). These warnings and precautionary statements concern the toxicological hazards of the pesticide, including "hazard to children, environmental hazard and physical and chemical hazard." *Id.* The EPA also requires that a statement of practical treatment (that is, first aid or other treatment) for each pesticide appear on the label. 40 C.F.R. § 156.10(h)(1)(iii). Additional warnings and precautionary statements about risks to humans are required under the heading "Precautionary Statements" and the subheading "Hazard to Humans and Domestic Animals."[2] Typical precautionary statements are prescribed which "must be modified or expanded to reflect specific hazards." *See* 40 C.F.R. § 150.10(h)(2)(i)(B) and table.[3] In addition, the EPA requires that pesticide labels must contain directions for use stated in terms "which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. §

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[2] The EPA requires that if a hazard exists to humans or domestic animals, these precautionary statements must indicate (1) "the particular hazard," (2) "the route(s) of exposure," and (3) "the precautions to be taken to avoid accident, injury or damage." 40 C.F.R. § 156.10(h)(2)(i)(A). The precautionary statements indicate whether protective equipment or garments are necessary when applying the pesticide.

[3] A pesticide is considered misbranded if "the label does not contain a warning or caution statement which may be necessary" and which if complied with, "is adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(G). A manufacturer is subject to penalties under FIFRA if its pesticide is misbranded.

156.10(i)(1)(i). These directions, when followed, "must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment." *Id.*[4] It is in the light of these comprehensive regulations that the EPA approves a specific label for each pesticide.

We conclude that FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways. First, having considered FIFRA's express prohibition of state labeling requirements in addition to those required under FIFRA, 7 U.S.C.A. § 136v(b), and having examined the labeling regulations adopted pursuant to FIFRA, see *supra*, we hold that the federal government has occupied the entire field of labeling regulation, leaving no room for the states to supplement federal law, even by means of state common law tort actions.

We also hold that jury awards of damages in such tort actions would result in direct conflict with federal law. For EPA registered pesticides, the warning and use statements present on the labels

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[4] In addition, a pesticide is considered misbranded -- and a manufacturer subject to various penalties, including registration revocation -- if the labeling "does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with ... are adequate to protect health and the environment." 7 U.S.C.A. § 136(q)(1)(F). "The basic purpose of the statute [is] to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions." *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D.Ill. 1988)(quoting *Continental Chemiste Corp. v. Ruckelshaus*, 461 F.2d 331, 335 (7th Cir. 1972)).

indicate that the EPA has determined that those statements are adequate to protect man and the environment: that the pesticide as labeled does not pose "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See* 7 U.S.C.A. §§ 136(q)(1)(F), 136(q)(1)(G), 136 (bb); 40 C.F.R. §§ 156.10(h), 156.10(i). Thus, a jury determination, via a state common tort judgment, that a pesticide's labeling is inadequate results in a direct conflict with the EPA's determination that the labeling is adequate to protect against health risks. Such a jury determination is also in direct conflict with the Congressional intent that *the EPA Administrator* determine the reasonableness of the risks to man and the environment posed by pesticides, at least with respect to the labeling of pesticides[5]

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[5] The states are specifically permitted to make such determinations with respect to the "sale or use" of pesticides, as long as they do not permit any sale or use prohibited by the federal government under FIFRA. *See* 7 U.S.C.A. § 136v(a). *New York State Pesticide Coalition Inc. v. Jorling,* 874 F.2d 115 (2d Cir. 1989), is instructive about the respective authority of the state and federal governments to regulate pesticides under FIFRA. In *Jorling* the Second Circuit upheld certain state notification requirements placed on commercial pesticide applicators. It noted that "[t]he states have joint control with the federal government in regulating the use of pesticides, for the safety of its citizens and the environment ... with the exception of the EPA's exclusive supervision of labeling." 874 F.2d at 118 (citation omitted). It drew a distinction between FIFRA labeling which "is designed to be read and followed by the end user," and notification requirements -- regulation on pesticide use -- placed on particular end users (professional pesticide applicators) which require them to provide certain information to those who contract to have pesticide applied, and to members of the public who may be exposed to the chemicals as a result of their application to public areas. *Id.* at 119.

In addition, allowing state common law tort suits for inadequate labeling would "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." One of the EPA's objectives in its labeling regulations is the uniformity of labeling across the nation and among (1) different brands of the same pesticide, (2) different pesticides performing the same function, and (3) different pesticides posing the same or similar risks to health and the environment. *See* 40 C.F.R. Part 156.[6] This objective of achieving uniformity in labeling was endorsed by Congress: in 1988, without changing the language of § 136v(b) which prohibits state regulation of pesticide labeling and packaging, Congress added the heading "Uniformity" to this section. A jury determination that a label was inadequate would require that the manufacturer change the label or risk

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[6] This desire for uniformity is particularly evident in the regulation of pesticide warnings. Pesticides are grouped into four human toxicity categories based on selected hazard indicators, which include oral, inhalation, and dermal toxicity indicators and the effects of pesticide contact with eyes or skin. *See* table at 40 C.F.R. § 156.10(h)(1). The text of the warning on the front panel of the label is based on the pesticide's toxicity category. 40 C.F.R. § 156.10 (h)(1). EPA regulations dictate which of four signal words can be used on the front panel of the label, depending on the toxicity category into which the pesticide falls--"Danger" and/or "Poison" for category I: "Warning" for category II; and "Caution" for categories III and IV. 40 C.F.R. §§ 156.10(h)(1)(i)(A)--156.10(h)(1)(i)(D). A pesticide manufacturer is *not* allowed to use "signal word(s) associated with a higher Toxicity Category" on its label, unless the EPA determines that "such labeling is necessary to prevent unreasonable adverse effects on man or the environment." 40 C.F.R. § 156.10(h)(1)(i)(E). In addition, a manufacturer cannot put more than one human hazard signal word on the front panel of the label. *Id.*

additional suits for damages. Such a change, if permitted by the EPA, would destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling because the warning label for that pesticide would not be based on the same criteria the EPA uses to establish warnings for all other pesticides.

It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee,* 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling. *See Kennan v. Dow Chem. Co.,* 717 F.Supp. 799, 806-07 (M.D.Fla. 1989); *Fitzgerald v. Mallinckrodt, Inc.,* 681 F.Supp. 404, 107 (E.D.Mich. 1987); *see also Palmer v. Liggett Group, Inc.,* 825 F.2d 620, 627-28 (1st Cir. 1987)(damages awards for inadequate labeling preempted by Federal Cigarette Labeling and Advertising Act). This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.

In this way, state common law tort suits based on labeling claims would also "stand as an obstacle to the accomplishment and execution of the full objectives of Congress" even if such suits led to "better" or "more adequate" labels, there by serving

FIFRA's goal of regulating pesticides "to protect man and his environment." A state law action which shares the same purpose as the federal law in question is preempted if it attempts to achieve that purpose by a method which interferes with the federal methods; as the Supreme Court said in *Ouellette,*

> it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designated to reach this goal.

479 U.S. at 494, 107 S.Ct. at 813. For the labeling of pesticides, the EPA evaluates the toxicological data of any individual pesticide in comparison with the toxicological data for other pesticides, to achieve the protection of "man and his environment" through a labeling system that is uniform and consistent across the broad spectrum of pesticides. A jury's imposition of damages in a state tort suit premised on labeling claims would disrupt the methods by which FIFRA protects man and the environment because it would inject irrelevant considerations into the EPA's

evaluation of a pesticide and its labeling and would second guess the EPA's conclusions.[7]

Allowing state common law tort actions based on labeling claims would permit state court juries to do what state legislatures and state administrative agencies are forbidden to do: impose requirements for labeling pesticides. As we have stated before, the "imposition of damages under state tort law has long been held to be a form of state regulation subject to the supremacy clause." *Taylor,* 875 F.2d at 824 n. 16. Considering our understanding of Congress's intent, we decline to permit such state regulation.

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[7] As the Supreme Court noted in the context of the Clean Air Act, [s]uch penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits .... If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum IPC would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability .... The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly -- regulate the conduct of out-of-state concerns. *Ouellette* 479 U.S. at 495, 107 S.Ct. at 813.

IV. CONCLUSION

We hold that FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides to the extent that such actions are based on claims of inadequate labeling.[8]

The judgment of the district court is AFFIRMED.

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[8] Papas contends that even if we hold that FIFRA preempts state common law tort suits based on labeling claims, we should recognize an exception for instances in which, as Papas says exists here, a manufacturer has failed to provide the EPA with complete information on the pesticide. *See Hurley v. Lederle Labs. Div. of American Cyanamid Co.*, 863 F.2d 1173, 1179-80 (5th Cir. 1988). To the extent that *Hurley* purports to recognize an exception to federal preemption of common law tort labeling claims when the federal statute involved explicitly prohibits state regulation of labeling and the federal agency has received incomplete information from the manufacturer, we reject its holding at least as applied to FIFRA-regulated pesticides. Given the FIFRA regulatory scheme, it would be up to the EPA--and not a jury--to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected.

SUPREME COURT OF THE UNITED STATES

No. 90-1837

Minas H. Papas, et ux.,

Petitioners,

v.

Zoecon Corporation

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. ___ (1992).

IT IS FURTHER ORDERED that the petitioners, Minas H. Papas, et ux., recover from Zoecon Corporation Three Hundred Dollars ($300.00) for their costs herein expended.

June 29, 1992

Clerk's costs: $300.00

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3752

D. C. Docket No. 88-00116-Civ-J-14

MINAS H. PAPAS, OLLIE M. PAPAS, his wife,

Plaintiffs-Appellants,

versus

THE UPJOHN COMPANY, a Delaware corporation qualified to do business in the State of Florida, ZOECON CORPORATION, a Delaware corporation currently doing business in the State of Florida,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before ANDERSON and EDMONDSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

U.S. Court of Appeals
Eleventh Circuit
FILED
Aug 4 1992
MIGUEL J. CORTEZ, CLERK

O R D E R:

Appellant is directed to file a supplemental brief within 20 days of this order and to comment on the significance of Cipollone v. Liggett Group, Inc., No. 90-1038 (U.S. 24 June 1992) for this case. Appellee shall reply within 14 days after service of appellant's brief. The briefs shall not exceed 20 pages.

/s/ J. L. EDMONDSON
United State Circuit Judge